

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NINA WATERS,

No C 05-1092 VRW

Plaintiff,

ORDER

v

JO ANNE B BARNHART, Commissioner
of Social Security,

Defendant.

Plaintiff Nina Waters brings this action under 42 USC section 405(g), challenging the final decision of the Social Security Administration ("SSA") to deny her applications for supplemental security income ("SSI") benefits and disability insurance benefits ("DIB"). Pl Mot (Doc #20). The parties have filed cross-motions for summary judgment. For the reasons that follow, the court DENIES plaintiff's motion for summary judgment and GRANTS defendant Jo Anne B Barnhart's motion for summary judgment.

I

A

Plaintiff was born on July 11, 1955. Administrative Record, Doc #9 ("AR") 158. Plaintiff was 46 years old at the time of her application and she has a ninth grade education. AR 177. She has past relevant work experience as a cashier, a warehouse worker, a retail worker/manager and a bartender. AR 195. Plaintiff stopped working in 1998 (or, according to the record of one psychological evaluation, 1995 (AR 453)) for reasons unrelated to her health and has not worked since. AR 21, 171.

Plaintiff testified that from January 2001 to April 2001, she experienced dizziness, blackouts and bad headaches. AR 36-37. Her symptoms increasingly worsened and after she passed out five times from trying to get to a telephone, plaintiff admitted herself into San Joaquin General Hospital. AR 36. On April 17, 2001, she was diagnosed with adult-onset communicating hydrocephalus. AR 309, 310. Communicating hydrocephalus is caused by "obstruction to the cerebrospinal fluid flow from outside the ventricular system." AR 245.

On April 24, 2001, plaintiff underwent surgery for placement of a ventriculoperitoneal shunt. AR 321-323. Plaintiff testified that after the surgery, she still experienced migraines, dizziness and blackouts. AR 38. She testified that she felt the shunt physically and that it impaired her ability to perform her daily activities. AR 39. She experienced trouble brushing her hair on the right side, trouble twisting and turning, diarrhea and daily headaches. AR 39-40. Plaintiff testified that she used Excedrin for her headaches. AR 40. In her request for

1 reconsideration, plaintiff reported she felt "constant pain from
2 the shunt" and an "unexplained numbness in my foot." AR 213.

3 On August 23, 2001, Plaintiff was re-admitted to San
4 Joaquin General Hospital for a possible shunt infection. AR 292.
5 A shunt tap was performed and plaintiff was given pain medication.
6 Id. The results of the shunt tap revealed "zero white cells and no
7 bacteria seen on Gram stain." Id. Plaintiff's test results
8 indicated she did not have a shunt infection. AR 295.

9 Plaintiff's daughter, Rebecca Waters, prepared two Third
10 Party Information Questionnaires regarding her mother's daily
11 activities. AR 183-88, 201-06. She reported plaintiff generally
12 spent a typical day "sleeping and watching tv." AR 183. She
13 reported that she prepared and cooked meals for plaintiff, helped
14 plaintiff shower and also helped with laundry and other household
15 chores. AR 184. She also reported plaintiff was unable to stand
16 for a long period of time without getting sick or dizzy and could
17 not drive. AR 185.

18 In December 2001, plaintiff's friend, Shari Spear, also
19 prepared a Third Party Questionnaire. AR 226. Ms Spear reported
20 plaintiff "can't bath [sic] as often unless someone is there to
21 help her * * *." AR 227. She also reported plaintiff needed help
22 to complete her household chores and had no recreational activities
23 or hobbies. Id. On the personal information section, Ms Spear
24 reported plaintiff has a "hard time remembering something five
25 minutes before" and plaintiff's "whole personality has changed."
26 AR 230-31.

27 Plaintiff did not have medical coverage during the
28 relevant period, so she primarily received medical attention from

1 the emergency department and surgical unit at San Joaquin General
2 Hospital. AR 240. Therefore, she did not have a primary care
3 physician or a treating neurologist. Id.

4 The record contains reports from consulting examinations
5 ordered by the SSA in connection with plaintiff's claim for
6 benefits. On September 20, 2001, a consultative psychological
7 examination was performed by psychologist Richard Richwerger, EdD.
8 AR 258. Dr Richwerger noted plaintiff's performance on the
9 psychological tests appeared to be "effected [sic] by her
10 significant use of Demerol" and "not valid due to performance
11 inconsistencies and due to the fact that the claimant appeared to
12 be significantly intoxicated by medication." AR 261-64.

13 On September 21, 2001, a consultative neurological
14 examination was performed by S McIntire, MD. AR 265. The
15 neurologist reported there were no abnormal findings to suggest
16 functional limitations. AR 268. The report indicated that
17 plaintiff's symptoms were consistent with communicating
18 hydrocephalus but that objectively, plaintiff did not have any
19 cognitive, motor or sensory deficits. Id.

20 On March 29, 2002, plaintiff injured her upper and lower
21 back during an automobile accident. AR 414. X-rays of plaintiff's
22 lower back revealed mild degenerative disk disease and facet joint
23 arthritis. AR 422. For pain, plaintiff took Vicodin, Skelaxin,
24 and Neurontin. AR 414. Plaintiff was referred to physical
25 therapy, which she attended from May 20, 2002 to August 16, 2002.
26 AR 391. At her initial evaluation on May 20, plaintiff rated her
27 pain as an 8 out of a 10 point scale and described it as
28 "constant." AR 414. At the hearing, plaintiff testified that the

1 pain from her neck created a burning sensation and it made her
2 "sick to [her] stomach." AR 45. Plaintiff was discharged from
3 physical therapy in August 2002 and reported feeling fifty to sixty
4 percent better. AR 383, 391.

5 After plaintiff told the ALJ that the testing done by Dr
6 Richwerger was unreliable, AR 52-61 and infra, the ALJ suggested an
7 additional consultative psychological examination, to which
8 plaintiff agreed. AR 104. After the hearing, therefore, plaintiff
9 underwent an additional consultative psychological examination with
10 Michael Moseley, PhD. AR 453. During the examination, plaintiff
11 told Dr Moseley that she had headaches every day and that her range
12 of involvement was limited by pain or discomfort. Id. Dr Moseley
13 reported that plaintiff had a history of methamphetamine abuse
14 "[o]ff and on for the last ten years" and that her "limitations
15 reported for functional daily activities appeared to be
16 questionable." Id. Dr Moseley reported that plaintiff
17 demonstrated behaviors consistent with amphetamine abusers in the
18 population and that her MMPI-II score was invalid. AR 456, 457.
19 On the Mental Residual Functional Capacity Assessment form he
20 completed, Dr Moseley indicated that plaintiff had no abnormalities
21 or limitations. AR 450-53.

22
23 B

24 On July 20, 2001, plaintiff filed applications for DIB
25 and SSI benefits with the SSA, listing her disability onset date as
26 January 16, 2001. AR 158-60; 459-60. She based her claim on
27 alleged "water on the brain" and short-term memory problems due to
28 hydrocephalus. AR 109. On November 21, 2001, the SSA denied the

1 application, stating "[t]hough you may have pain, swelling and
2 tenderness of your brain, the records show that your condition is
3 responding or has responded to treatment * * *." AR 462.

4 Plaintiff filed for reconsideration. AR 467. The request was
5 denied. AR 113; 467.

6 Plaintiff filed a request for an administrative hearing.
7 AR 119. A hearing was held on September 9, 2002. AR 25.
8 Plaintiff appeared without counsel and the Administrative Law Judge
9 (ALJ) informed plaintiff of her right to representation. AR 27.
10 The hearing was continued to allow plaintiff to obtain
11 representation. AR 28.

12 On December 2, 2002, the ALJ opened a second hearing at
13 which plaintiff appeared with counsel. AR 30-106. Plaintiff and
14 Robert Raschke, the vocational expert (VE), were the only two
15 witnesses to testify. AR 31. The VE testified that a hypothetical
16 individual under age fifty with plaintiff's past relevant work
17 experience, level of education, and a residual functional capacity
18 (RFC) for exertionally light, unskilled work would be able to work
19 nationally at 617,175 jobs and regionally at 7,300 jobs. AR 84,
20 88, 90. The VE testified that taking into consideration
21 plaintiff's cervical spine limitation, there would be a forty
22 percent erosion overall of these numbers. Id. The ALJ stated that
23 he would disregard the regional numbers because after the erosion,
24 the numbers would be insignificant. AR 97, 102-103. The ALJ noted
25 that this fact was irrelevant because the law only requires that
26 there be jobs available in the national economy, not the region in
27 which the claimant resides. AR 98. Under the Medical-Vocational
28 guidelines, there are approximately 1,600 separate sedentary and

1 light occupations that exist in the national economy, each
2 representing numerous jobs. 20 CFR Part 404, Subpt p, App 2.

3 At the administrative hearing, plaintiff raised concerns
4 about the existing medical evidence from the psychological
5 consultation by Dr Richwerger, EdD. AR 52-61. The ALJ proposed
6 "follow-up" testing and plaintiff agreed. AR 104.

7 The VE was asked to retain his notes in the event
8 plaintiff's attorney had additional questions for him after the
9 new psychological exam. Id. The ALJ and plaintiff's attorney
10 agreed that if there was a supplemental hearing, it would be a
11 telephone hearing with the VE. Id. After the hearing, as
12 described in part IA supra, Dr Moseley re-evaluated plaintiff. AR
13 453-57. Plaintiff now argues that the ALJ improperly failed to
14 proffer this post-hearing evaluation to plaintiff.

15 On July 14, 2003, the ALJ issued a decision denying
16 plaintiff benefits. AR 15-24. The ALJ applied the five-step
17 sequential evaluation process set forth in the SSA regulations for
18 determining whether a claimant is disabled. 20 CFR §§ 404.1520,
19 416.920. The five-step evaluation process is as follows: (1)
20 determine whether the claimant is currently employed in substantial
21 gainful activity (ie, work that involves significant physical or
22 mental activities, and is performed for pay or profit); (2) if the
23 claimant is not currently employed in such activity, then determine
24 whether the claimant has a severe impairment or combination of
25 impairments that significantly limits his or her physical or mental
26 ability to do basic work; (3) if the claimant does have such an
27 impairment or combination of impairments, then determine whether
28 the claimant has an impairment(s) which meets or equals the

1 impairments in the Listing of Impairments, 20 CFR pt 404, subpt p,
2 app 1; (4) if the claimant does have such an impairment(s), then
3 the claimant will be considered disabled, but if the claimant does
4 not have such an impairment(s), then determine whether the claimant
5 has the residual functional capacity to perform his or her past
6 work; and (5) if the claimant is unable to perform his or her past
7 work, then determine whether the claimant has the residual
8 functional capacity to perform any other work which exists in
9 substantial numbers in the national economy. 20 CFR § 404.1520,
10 CFR § 416.920. The determination that a claimant can perform other
11 work may be established: (1) by the testimony of a vocational
12 expert, or (2) by reference to the Medical-Vocational Guidelines at
13 20 CFR pt 404, subpt p, app 2. Id. If a claimant is unable to
14 perform any other work, then the claimant will be considered
15 disabled. Id.

16 Applying the five-step sequential evaluation to the case
17 at hand, the ALJ found: (1) plaintiff met the Act's insured status
18 requirements through December 2002; (2) plaintiff has not engaged
19 in substantial gainful activity since her alleged disability onset
20 date; (3) plaintiff has the "severe" impairments of hydrocephalus
21 status post shunt placement/revision, seizures with headaches,
22 cervical and lumbar degenerative disc disease, and an anxiety
23 disorder or amphetamine abuse in uncertain remission; (4)
24 plaintiff did not have an impairment that met or equaled any
25 listed impairment; (5) plaintiff's subjective complaints were not
26 entirely credible; (6) plaintiff had the RFC for both sedentary
27 and light work; (7) plaintiff was unable to perform past relevant
28 work; (8) plaintiff was a "younger individual" so that her limited

1 education and transferability of skills were not relevant to
2 plaintiff's vocational profile due to her young age; and (9) there
3 were other jobs existing in significant numbers that plaintiff was
4 able to perform and therefore, plaintiff was not disabled as
5 defined by the Act. AR 23.

6 The ALJ's determination of plaintiff's RFC was based on
7 the physical therapist's report, the consultative examiner's
8 report and the plaintiff's own testimony as to her limitations.
9 AR 21. The ALJ did not give great weight to the initial
10 consultative examiner's report because of plaintiff's complaint at
11 the hearing that the examiner did not conduct a thorough
12 evaluation. AR 22. Further, the ALJ did not find plaintiff's
13 testimony credible as to the intensity, persistence, and limiting
14 effects of her impairments. AR 21. He explained that her
15 testimony regarding her pain and physical limitations conflicted
16 with other evidence in the record and the ALJ noted:

17 The claimant has not received any
18 significant or ongoing treatment for back
19 pain. She has been prescribed narcotic
20 pain medications * * *. However, she is
21 able to engage in * * * recreational
22 activities such as gambling at a casino,
23 boating on a lake, and camping. Further,
24 a consultative examiner raised the
25 possibility of prescription drug abuse,
26 in which case the claimant's use of pain
27 medications may not be reflective of her
28 pain level. The possibility of illicit
drug use was raised by another
consultative examiner * * *.

AR 21.

Based on the VE's testimony, the ALJ found that there
were a significant number of jobs that plaintiff could perform
within a limited range of the sedentary and light work categories.

1 AR 22-23. The ALJ concluded plaintiff was not disabled within the
 2 framework of Rules 201.09 and 202.18 of the Medical-Vocational
 3 guidelines. AR 23; 20 CFR pt 404, subpt p, app 2.

4 Plaintiff appealed the ALJ's decision to the SSA's
 5 Appeals Council,¹ which denied review, making the ALJ's decision
 6 final. AR 5. On March 15, 2005, plaintiff timely filed the
 7 instant action for judicial review of the ALJ's decision. Doc 1.

8 9 II

10 The court's jurisdiction is limited to determining
 11 whether the SSA's final decision to deny benefits is supported by
 12 substantial evidence in the administrative record. 42 USC §
 13 405(g). Substantial evidence is more than a scintilla but less
 14 than a preponderance; it is such relevant evidence as a reasonable
 15 mind might accept as adequate to support a conclusion. Thomas v
 16 Barnhart, 278 F3d 947, 954 (9th Cir 2002). A district court may
 17 overturn a decision to deny benefits only if the decision is not
 18 supported by substantial evidence or if the decision is based on
 19 legal error. See Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir
 20 1995); Magallanes v Bowen, 881 F2d 747, 750 (9th Cir 1989).
 21 Determinations of credibility, resolution of conflicts in medical
 22 testimony and all other ambiguities are to be resolved by the ALJ.
 23 Morgan v Commissioner of Social Sec Admin, 169 F3d 595, 599 (9th

24
 25 ¹ The Court has been unable to reconcile with the procedural
 26 history of this case with plaintiff's representative's statement that
 27 plaintiff was subsequently awarded Title XVI benefits "due to the
 28 ALJ's determination dated July 14, 2003" with an onset date of July
 1, 2003. Doc #20 at 3, AR 8. There is no record of this alleged
 award anywhere else in the record. It has, however, no bearing on the
 outcome of the instant appeal.

1 Cir 1999). The decision of the ALJ will be upheld if the evidence
2 is "susceptible to more than one rational interpretation."
3 Andrews, 53 F3d at 1040.

4
5 III

6 A

7 Disability is the "inability to do any substantial
8 gainful activity by reason of any medically determinable physical
9 or mental impairment which can be expected to result in death or
10 which has lasted or can be expected to last for a continuous
11 period of not less than 12 months." 20 CFR § 404.1505(a), 20 CFR
12 § 416.905(a). An individual is considered "disabled" if his
13 impairments are such "that he is not only unable to do his
14 previous work but cannot * * * engage in any other kind of
15 substantial gainful work which exists in the national economy * *
16 *." Id.

17 A claimant may be found "not disabled" at any step in
18 the five-step evaluation process; a claimant may be found
19 "disabled" only at step three or five. 20 CFR § 404.1520(a)(4),
20 20 CFR § 416.920(a)(4). The claimant bears the burden of proof at
21 steps one through four. Bustamante v Massanari, 262 F3d 949, 953-
22 54 (9th Cir 2001) (citing Tackett v Apfel, 180 F3d 1094, 1098 (9th
23 Cir 1999)). At step five, the burden of proof shifts to the SSA.
24 Id; see also Brown v Apfel, 192 F3d 493 (5th Cir 1999) ("This
25 shifting of the burden of proof [] is neither statutory nor
26 regulatory, but instead, originates from judicial practices.").
27 If a plaintiff reaches step five, the Secretary has the burden of
28 proving that there are jobs in the national economy that the

1 plaintiff can perform. Oyen v Shalala, 865 F Supp 497, 504 (D Ill
2 1994).

3 At step two of the evaluation process, if the claimant
4 suffers from a combination of impairments, the combined effect of
5 all impairments will be considered "without regard to whether any
6 such impairment, if considered separately, would be of sufficient
7 severity." 20 CFR § 404.1523, 20 CFR § 416.922(b). Further, if
8 the claimant has "a medically severe combination of impairments,
9 the combined effect of the impairments will be considered
10 throughout the evaluation process." Id.

11 According to SSR 96-7p, the adjudicator is required to
12 make "a finding about the credibility of the individual's statements
13 about the symptom(s) and its functional effects." SSR 96-7p. The
14 adjudicator must "carefully consider the individual's statements
15 about the symptoms with the rest of the relevant evidence in the
16 case record * * *." Id. The adjudicator must consider the entire
17 case record, including objective medical evidence and statements
18 from "other persons about the symptoms and how they affect the
19 individual, and any other relevant evidence. Id.

20 20 CFR § 404.1513 reads, in pertinent part,

21 In addition to evidence from the
22 acceptable medical sources listed in paragraph
23 (a) of this section, we may also use evidence
24 from other sources to show the severity of
your impairment(s) and how it affects your
ability to work. Other sources include, but
are not limited to:

25 (1) Medical sources not listed in
26 paragraph (a) of this section (for example,
27 nurse-practitioners, physicians' assistants,
28 naturopaths, chiropractors, audiologists, and
therapists);

\\

1 (4) Other non-medical sources (for
2 example, spouses, parents and other
3 caregivers, siblings, other relatives,
4 friends, neighbors, and clergy).

5 Under 20 CFR § 404.953 (a), the administrative law judge's
6 decision must be based on evidence offered at the hearing or
7 otherwise included in the record (emphasis added).

8 B

9 Plaintiff makes three major contentions in support of
10 her motion. First, she contends the ALJ erred by not proffering
11 post-hearing medical evidence for comment and possible request for
12 a supplemental hearing, thereby violating plaintiff's due process
13 rights. Second, plaintiff contends the ALJ erred as a matter of
14 law by ignoring the evidence from lay persons regarding
15 plaintiff's pain and physical limitations. And third, plaintiff
16 contends that the ALJ's decision was not supported by substantial
17 evidence; specifically, plaintiff argues that the ALJ incorporated
18 into his decision unsupported allegations of drug use. The court
19 disagrees with these contentions.

20 1

21 Plaintiff contends her due process rights were violated
22 because the ALJ failed to proffer psychologist Dr Moseley's
23 opinion. The court finds plaintiff's due process rights were not
24 violated. Furthermore, even if the ALJ erred by not proffering
25 the post-hearing evidence, the error is harmless.

26 Plaintiff cites the SSA's Hearings, Appeals, and
27 Litigation Manual (HALLEX) I-2-7-30 in support of the proposition
28 that proffer of post-hearing evidence is mandatory. Plaintiff

1 also argues that cases such as Tom v Heckler, 779 F2d 1250 (7th
2 Cir 1985), Townley v Heckler, 748 F2d 109, 114 (2d Cir 1984), and
3 Yount v Barnhart, 416 F3d 1233 (10th Cir 2005), stand for the
4 proposition that proffer of post-hearing evidence to a claimant
5 and her representative is mandatory. Doc #20 at 8.

6 The Ninth Circuit has ruled that HALLEX does not
7 prescribe substantive rules and does not carry the force and
8 effect of law. Moore v Apfel, 216 F3d 864, 868 (9th Cir 2000);
9 see also Bunnell v Barnhart, 336 F3d 1112, 1115 (9th Cir 2003).
10 In Moore, the plaintiff appealed the decision of the district
11 court and argued that the ALJ's decision was erroneous because the
12 ALJ violated a provision of HALLEX. Moore, 216 F3d at 866. The
13 Ninth Circuit rejected that argument and found HALLEX is "not
14 binding on the Commissioner and we will not review allegations of
15 noncompliance with the manual." Id at 869. Because HALLEX is an
16 internal manual that does not have the force and effect of law,
17 this court will not entertain claims of alleged violations of the
18 manual.

19 Plaintiff also contends that prevailing case law
20 indicates that post-hearing evidence must always be proffered to a
21 claimant. Plaintiff's reliance on these cases is misplaced. In
22 Tom, the plaintiff did not contend that the ALJ's reliance on the
23 post-hearing vocational report denied him due process. Tom, 779
24 F2d at 1252. Therefore, the court did not address the merits of
25 whether a due process violation occurred. Id. Tom is irrelevant
26 to this case.

27 In Townley, the ALJ used a post-hearing vocational
28 report as the primary evidence in his decision to deny benefits.

1 Townley, 748 F2d at 114. In Yount, the court determined that
2 plaintiff's due process rights were violated when his request to
3 cross-examine a post-hearing medical report was denied. Yount,
4 416 F3d at 1235.

5 These two cases are distinguishable from the instant
6 case for two reasons: (1) the ALJ did not use the medical report
7 as his primary evidence to deny benefits and (2) in this case,
8 plaintiff was aware that a post-hearing medical evaluation was
9 underway – indeed, she participated in it – but did not
10 specifically request cross-examination.

11 A plaintiff in a disability hearing is not entitled to
12 unlimited cross-examination, but rather “such cross examination as
13 may be required for a full and true disclosure of the facts.” 5
14 USC § 556(d). The ALJ has discretion to decide when cross-
15 examination is warranted. Solis v Schweiker, 719 F2d 301, 301
16 (9th Cir 1983). Social security adjudications are non-adversarial
17 and therefore, the need to cross-examine every reporting physician
18 is not crucial to the fairness and accuracy of the ALJ's decision.
19 Flatford v Chater, 93 F3d 1296, 1306 (6th Cir 1996). “[D]ue
20 process does not require the Commissioner to allow a social
21 security claimant upon request to cross-examine every physician
22 providing post hearing evidence * * * .” Id at 1305.

23 Under the circumstances of this case, moreover, it
24 appears that the ALJ effectively proffered Dr Moseley's post-
25 hearing report to plaintiff. Proffer of post-hearing evidence can
26 be inferred from the circumstances. Oyen v Shalala, 865 F Supp at
27 509 n16. In Oyen, the ALJ did not “technically” proffer post-
28 hearing evidence, but the court viewed the circumstances under

1 which it was provided as the "practical equivalent of an ALJ
2 proffer." Id. Here, the record indicates plaintiff was aware
3 that a post-hearing psychological re-evaluation would occur.
4 Plaintiff was represented by counsel and, in fact, the evaluation
5 at issue was ordered specifically because plaintiff's counsel
6 voiced concerns about the first evaluation. The ALJ informed
7 plaintiff at the hearing that a re-evaluation would be set up.
8 Plaintiff requested permission to re-examine the VE with regards
9 to the new medical testimony but she did not request a
10 supplemental hearing for cross-examination of the post-hearing
11 psychological consultation - although she could have. Because
12 plaintiff had knowledge of and means of access to the post-hearing
13 report, the proffer requirement was satisfied.

14 An error is harmless if correction of that error would
15 not alter the result of the case. Curry v Sullivan, 925 F2d 1127,
16 1131 (9th Cir. 1990). The post-hearing psychological evaluation
17 was requested in order to clarify plaintiff's mental functioning
18 absent the effects of pain medications and/or illicit substances.
19 AR 20. Dr Moseley reported that plaintiff did not have any
20 significant mental or emotional limitations and his opinion
21 excluded any possible drug use. AR 450-52. His findings were
22 consistent with the other consultative physician who examined
23 plaintiff prior to the hearing. Furthermore, the ALJ's decision
24 made clear that the VE's testimony and plaintiff's lack of
25 credibility were the major factors in his decision to deny
26 benefits. While the ALJ mentioned Dr Moseley's report, it does
27 not appear to have been a significant factor in the ALJ's
28 decision. Accordingly, even assuming arguendo that plaintiff was

1 denied due process in connection with Dr Moseley's report, remand
2 would be futile because it would not alter the result. Any error
3 surrounding the ALJ's use of the Moseley report was harmless.

4 2

5 Plaintiff next contends that the ALJ failed to consider
6 the entire record in his decision because he did not mention the
7 third party questionnaires that plaintiff provided. The court
8 finds no legal error and that the ALJ did in fact consider the
9 entire record in his decision.

10 In interpreting the evidence and developing the record,
11 the ALJ is not required to discuss every piece of evidence.
12 Howard v Barnhart, 341 F3d 1006, 1012 (9th Cir 2003); Black v
13 Apfel, 143 F3d 383, 386 (8th Cir 1998). An ALJ's failure to cite
14 specific evidence does not indicate that such evidence was not
15 considered. Black, 143 F3d at 386. The ALJ is empowered to
16 reject cumulative testimony. Id at 387 (ALJ who properly
17 discredited plaintiff's complaints of pain is equally empowered to
18 reject the cumulative testimony of her parents).

19 Plaintiff contends the ALJ did not consider the Third
20 Party Questionnaires because he did not mention them in his
21 decision. Plaintiff argues that pursuant to SSR 88-13 and Smolen
22 v Chater, 80 F3d 1273 (9th Cir 1996), the ALJ was required to give
23 full consideration to testimony from family and friends. In
24 Smolen, plaintiff's medical records were sparse and the ALJ
25 rejected the testimony of her family and friends because he found
26 the testimony to be "biased." Id at 1289. SSR 88-13 states "In
27 evaluating a claimant's subjective complaints of pain, the
28 adjudicator must give full consideration to all of the available

1 evidence * * *." The court in Smolen ruled that under SSR 88-13,
2 the ALJ erred by failing to consider the testimony of Smolen's
3 family members regarding her symptoms. Smolen, 80 F3d at 1288.

4 This case is distinguishable from Smolen. In this case,
5 plaintiff's medical records were not sparse and the ALJ did not
6 state that he rejected the evidence from the Third Party
7 Questionnaires. Here, the ALJ reached his decision without citing
8 to the specific evidence. Contrary to plaintiff's contentions,
9 the ALJ's decision not to cite specific evidence presented at the
10 hearing does not give rise to an inference that the ALJ did not
11 consider that piece of evidence.

12 In Vincent v Heckler, 739 F2d 1393, 1395 (9th Cir 1984),
13 the court ruled that all evidence presented does not need to be
14 discussed; rather, the ALJ must explain why "significant probative
15 evidence has been rejected." Here, the Third Party Questionnaires
16 were not significant probative evidence. The questionnaires were
17 filled out by plaintiff's daughter and a friend. The
18 questionnaires all attested to plaintiff's daily activities and
19 these questionnaires were cumulative of plaintiff's testimony
20 regarding her physical limitations. The ALJ explained in his
21 decision that he did not find plaintiff's testimony credible
22 regarding the intensity of her pain (discussed below in section
23 III B 3). The ALJ fully considered the record in its entirety and
24 his decision is affirmed.

25 3

26 Plaintiff's final contention is that the ALJ's decision
27 is not supported by substantial evidence. Specifically, plaintiff
28 argues that the ALJ failed to develop the record because drug

1 testing was not performed on plaintiff and the "insinuations" of
2 drug abuse are not supported by the record. Furthermore,
3 plaintiff alleges that the ALJ took certain statements plaintiff
4 made out of context. After reviewing the record in its entirety,
5 the court finds there is substantial evidence in the record to
6 support the ALJ's denial of plaintiff's DIB and SSI applications
7 and the administrative record was properly developed.

8 The ALJ must fully and fairly develop the record to
9 assure that plaintiff's interests are considered. See Tonapetyan
10 v Halter, 242 F3d 1144, 1150 (9th Cir 2001). If plaintiff is
11 unrepresented, "the ALJ must be especially diligent in exploring
12 for all the relevant facts," id, including disabling factors not
13 raised but implicit in the record. Celaya v Halter, 332 F3d 1177,
14 1182-83 (9th Cir 2003) (holding that the claimant's illiteracy and
15 pro se status should have alerted the ALJ to develop the record
16 better).

17 SSA regulations state that "when the evidence [the SSA]
18 receives from [the claimant's] treating physician or psychologist
19 or other medical source is inadequate for us to determine whether
20 you are disabled," the SSA will seek additional information from
21 plaintiff's treating physicians or through SSA-ordered
22 consultative examinations. 20 CFR §§ 404.1512(e), 416.912(d).
23 SSA regulations only require an ALJ to seek additional evidence
24 when the medical reports from plaintiff's treating physicians are
25 conflicting, ambiguous or do not contain the information necessary
26 to making a determination regarding a claimant's disability. See
27 Mayes v Massanari, 276 F3d 453, 459-50 (9th Cir 2001).

28 \\\

1 Here, the ALJ fulfilled his duty fully and fairly to
2 develop the record to ensure that plaintiff's interests were
3 considered. During the hearing, plaintiff's counsel objected to
4 the first consultative evaluation because the examiner raised the
5 possibility of prescription drug abuse. Because of this
6 objection, the ALJ proposed to have new testing done and
7 plaintiff's counsel agreed to this remedy. Plaintiff claimed that
8 she was not given an opportunity to question the basis of the
9 psychologist's "insinuation," but plaintiff was fully aware of the
10 findings in the initial evaluation. Plaintiff's counsel had the
11 opportunity to – but did not – subpoena the first examiner or
12 request a drug test to cure the record of this "insinuation." The
13 ALJ's duty to develop the record was not further extended merely
14 because the second consultative examiner also raised the
15 possibility of illicit drug use.

16 Determinations of credibility, resolution of conflicts
17 in medical testimony, and all other ambiguities are to be resolved
18 by the ALJ. Andrews, 53 F3d at 1040. The ALJ's findings must be
19 supported by specific, cogent reasons. Rashad v Sullivan, 903 F2d
20 1229, 1231 (9th Cir 1990). The ALJ must identify what testimony
21 is not credible and what evidence undermines the claimant's
22 complaints. Lester v Chater, 81 F3d 821, 834 (9th Cir 1996). The
23 adjudicator makes the credibility finding regarding the
24 individual's statements about symptoms and their functional
25 effects. SSR 96-7p.

26 The ALJ determined that plaintiff's testimony regarding
27 the intensity and limiting effects of her impairments was not
28 credible. The ALJ's determinations about plaintiff's lack of

1 credibility did not rest solely on the consultative evaluations;
2 rather there were several other factors that the ALJ considered.
3 The ALJ specifically identified the discrepancies in plaintiff's
4 testimony. For instance, although plaintiff repeatedly alleged
5 that she can not stand for more than five minutes and that her
6 daily activities involved sleeping and watching television, the
7 exertion required for plaintiff's recreational activities far
8 surpassed her alleged physical limitations.

9 Evidence existed in the record that showed plaintiff
10 participated in a variety of vigorous recreational activities,
11 despite her "constant pain." On June 18, 2002, plaintiff was very
12 sore during a physical therapy session because she had "stayed up
13 all night at the casino." AR 403. About nine days later, on June
14 27th, plaintiff confessed at another physical therapy session that
15 she was very sore again because she had been camping. AR 399.
16 About two weeks later, plaintiff's "soreness" further increased
17 because she went swimming in the lake and paddled a boat. AR 395.
18 The ALJ did not take these statements out of context nor did he
19 misquote the record. These were statements that plaintiff herself
20 made to her physical therapist and confirmed at the hearing. The
21 fact that these activities "worsened" her pain symptoms does not
22 minimize the inconsistencies between her testimony regarding her
23 physical limitations and her testimony regarding her recreational
24 activities. These statements suggest a much greater functional
25 capacity than plaintiff claims to possess. Based on the conflict
26 between plaintiff's testimony and the evidence in the record,
27 substantial evidence supported the ALJ's determination that her
28 testimony was not credible.

IV

For the reasons stated herein, the court affirms the ALJ's decision to deny benefits. Accordingly, the court DENIES plaintiff's motion for summary judgment and GRANTS defendant Jo Anne B Barnhart's motion for summary judgment. The clerk is directed to enter judgment in favor of defendant and to close the file.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge